IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

MICHAEL S. TRAN, M.D., et al,	§	
	§	
Plaintiffs,	§	
	§	**CIVIL ACTION # 3:10-CV-0075-G**
VS.	§	
	§	
CITIBANK (SOUTH DAKOTA), N.A.,	§	
	§	
Defendant.	§	

PLAINTIFFS' RESPONSE TO DEFENDANT CITIBANK'S MOTION FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT

TO THE HONORABLE U.S. DISTRICT JUDGE, A. JOE FISH:

NOW COMES PLAINTIFFS, MICHAEL S. TRAN, M.D. (Dr. Tran) and his wife, **THAN H. TRAN** (Mrs. Tran) (referred to jointly as Plaintiffs), and files this Plaintiffs' Response and Brief in Support to the Motion for Summary Judgment filed by Defendant, **CITIBANK (SOUTH DAKOTA), N.A.** (Citibank), and in support would show the Court the following:

I. SUMMARY OF RESPONSE

This Court should deny Defendant's Motion for Summary Judgment under Rule 56 of Federal Rules of Civil Procedure because:

(1) The Motion ignores the actual breach of contract case pleaded and attempts to obtain summary judgment against a "reshaped" claim, created only by Citibank;

(2) The Motion makes literally no effort to show that the actual breach of contract case pleaded by Plaintiffs is free of genuine disputed issues of material fact sufficient to permit a proper summary judgment;

(3) The summary judgment evidence establishes several genuine disputed issues of fact exist regarding the breach of contract case actually pleaded by Plaintiffs;

(4) The common law libel case of Plaintiffs is not, under the evidence in this case, preempted by the FCRA;

(5) Plaintiffs' summary judgment evidence raises fact issues regarding causation and damages by reason of Citibank's unlawful conduct;

(6) Disputed issues of fact exist as to the ridiculous assertion by Citibank that each of the Plaintiffs is "libel-proof" as to their credit reputations; and

(7) The Motion fails to show that South Dakota law conflicts with the law of Texas on the controlling issue of the liability of an agent for failing to follow clear and lawful instructions.

II.
THE RULE 56 STANDARDS

The established purpose of Rule 56 of Federal Rules of Civil Procedure is to avoid "unnecessary" trials. Broadway v. City of Montgomery, Alabama, 530 F.2d 657 (5th Cir. 1976)("The obvious function of summary judgment is to avoid a useless trial.") Rule 56 is *not* intended to be a substitute for a trial of genuine disputed facts between the parties. Lipschutz v. Gordon Jewelry Corp., 373 F. Supp. 2d 375 (S.D. Tex.-Houston 1974); Southern Distributing Co., Inc. v. Southdown, Inc., 574 F.2d 824 (5^{th} Cir. 1978)(Southern).

Under Rule 56, a district court may not *try* issues of disputed fact in the evidence. Southern, 574 F.2d 824, 826 (5^{th} Cir. 1978). The summary judgment process may not be used to deprive a litigant of a full trial of genuine fact issues. United States v. Burket, 402 F.2d 426 (5^{th} Cir. 1968)("Summary Judgment should only be granted when it is clear what the truth is and where no genuine issue remains for trial. It is not the purpose of Rule 56 to deny litigants the right of a trial if they really have issues to try."); Bros, Inc. v. W.E. Grace Manufacturing Co., 261 F.2d 428, 432 (5th Cir. 1958).

The Fifth Circuit, in a 1940 decision, characterized the limitations of summary judgment practice as follows:

> Summary judgment procedure is not a catch penny contrivance to take unwary litigants into its toils and deprive them of a trial. It is a liberal measure, liberally designed for arriving at the truth. Its purpose is not to cut litigants off from their right to trial by jury, if they really have evidence which they will offer on a trial, it is to carefully test this out, in advance of trial by inquiring and determining whether such evidence exists.

Whitaker v. Coleman, 115 F.2d 305, 307; (5th Cir. 1940); *WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 3d* (2008), §2712, Page 210-11 (*WRIGHT, MILLER & KANE*).

A district court should be cautious about invoking Rule 56 so as to avoid depriving litigants of their rights to a jury trial. Solomon v. Houston Corrugated Box Co., Inc., 526 F.2d 389 (5th Cir. 1976). The party defending a motion for summary judgment under Rule 56 will have a natural advantage in any appellate review of the granting of summary judgment, by reason of the appellate court's reading of the trial court's record in a light "most favorable to the non-moving party." Wilson v. Taylor, 658 F.2d 1021 (5th Cir. 1981); Simon v. United States, 711 F.2d 740 (5th Cir. 1983); Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee, 129 S.Ct. 846 (2009)("Because this case arises out of the District Court's grant of summary judgment for Metro, we are required to view all facts and draw all reasonable inferences in favor of the nonmoving party...").

A district court is also required to review and consider the unchallenged pleadings of the non-moving party in their entirety and as broadly as possible when passing on a motion for summary judgment. United States v. Stribling Flying Serv., Inc.,734 F.2d 221, 224 (5th Cir. 1984); *WRIGHT, MILLER & KANE*, §2722, page 368, n. 3. The principal judicial inquiry under Rule 56 is whether a genuine issue of material fact exists. *WRIGHT, MILLER & KANE*, §2725, page 401, n. 1; Ecology Center of Louisiana, Inc. v. Coleman, 515 F.2d 860 (5th Cir. 1975)("If there is a real factual dispute between the parties, relevant to a legal claim, then they must be afforded a trial.") Materiality is a criterion for categorizing factual disputes in relation to the legal elements of the claim. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)(Anderson). The materiality determination rests on the substantive law, and only those facts identified by the substantive law to be critical are considered material. *Id*. Stated differently, "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id*.

A material fact issue is *genuine* if the evidence is such that a reasonable jury *could* find the fact in favor of the non-moving party. Anderson, *supra*, at 249. If the evidence simply shows some metaphysical doubt as to the fact, or if the evidence is not significantly probative, the issue is not genuine. Anderson, *supra*, at 250-51.

A genuine issue exists as long as the "slightest doubt" exists as to the facts. Clark v. West Chemical Products, Inc., 557 F.2d 1155 (5th Cir. 1977) ("The burden is on the moving party, West, to show that there is 'not the slightest doubt' as to the facts and that only the legal conclusion remains to be resolved."); *WRIGHT, MILLER & KANE*, §2725, page 425, n. 26. Summary judgment is, therefore, proper only when the summary judgment record shows affirmatively that the opposing party could not prevail under any circumstances. Heller v. Namer, 666 F.2d 905, 912, n. 14 (5th Cir. 1982)("In essence, summary judgment is reserved for the situation where the moving party has established his right to judgment with such clarity that the non-moving party cannot recover under any discernible circumstance."); *WRIGHT, MILLER & KANE*, §2725, page 429, n. 32.

A district court may not summarily *try* the facts of the case; the role of the judge is limited to the application of the law to the undisputed facts that have been established by the litigants' papers. *WRIGHT, MILLER & KANE*, §2725, page 432, note 37; Southern, 574 F.2d 824 (5th Cir. 1978).

If evidence is subject to conflicting interpretations or if reasonable people might differ as to the significance of the evidence, summary judgment is not proper. Kennett-Murray Corp. v. Bone, 622 F.2d 887 (5th Cir. 1980); Lighting Fixture and Electric Supply Company, Inc. v. Continental Insurance Company, 420 F.2d 1211, 1213 (5^{th} Cir. 1969); Winters v. Highlands Insurance Co., 569 F.2d 297 (5^{th} Cir. 1978); *WRIGHT, MILLER & KANE*, §2725, page 437, n. 40-41.

The burden on the non-moving party is not a heavy one. The non-moving party is only required to show facts, as opposed to general allegations, that present a genuine issue worthy of trial. Gossett v. Du-Ra-Kel Corp., 569 F.2d 869 (5^{th} Cir. 1978); *WRIGHT, MILLER & KANE*, §2727, page 490, n. 60. A district court has no "discretion" to enlarge its power to grant a summary judgment, beyond the limits of Rule 56. FDIC v. Dye, 642 F.2d 837 (5^{th} Cir. 1981); *WRIGHT, MILLER & KANE*, §2728, page 517, n. 1.

Proof of malice, of necessity, calls for proof of a party's state of mind. This places into question the subjective state of mind of one of the parties, and summary judgment must often be refused in situations where that issue is raised. *WRIGHT, MILLER & KANE*, §2730, page 9, n. 11. This is oftentimes the case in actions involving libel and slander. Rebozo v. The Washington Post Co., 637 F.2d 375, 381 (5^{th} Cir. 1981); Hutchinson v. Proxmire, 99 S. Ct. 2675, 2680, n. 9 ("The proof of "actual malice" calls a defendant's state of mind into question, *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L. Ed 2d 686 (1964), and does not readily lend itself to summary disposition.").

III.
APPLICATION OF THE STANDARDS IN THIS CASE

(a). Defendant Citibank has failed to show any true "conflict" between the law of South Dakota and Texas with regard to the contractual duty of an agent to follow clear and lawful instructions of his principal. Under such circumstances, this Court must assume the law of South

Dakota is the same as the law in Texas. In fact, statutory provisions in South Dakota Codified Laws affirmatively establish that, except under narrow circumstances not shown here, an agent may *not* disobey the clear and lawful instructions of his principal.

Citibank's Motion presents the argument that no small part of the reason it is entitled to summary judgment is because the substantive law in this case should be governed by the law of South Dakota because the Card Agreement so states. See Defendant's Motion, page 3, paragraph 8. However, Citibank's Motion puts forth no effort to establish how the substantive law of South Dakota *differs* from the law of Texas, if any, on the *controlling* issue, to wit: whether an agent owes a contractual duty to obey the clear and lawful instructions of his principal in the performance of his duties.

In the absence of proof to the contrary, there is a presumption in Texas that another state's law is the same as the law of Texas. Braddock v. Taylor, at 592 S.W.2d 40 (Tex. Civ. App.-Beaumont 1979, writ refused n.r.e.); Duncan v. Cessna, 665 S.W.2d 414, 419 (Tex. 1984); Bonn Operating Co. v. Devon Energy Production Co., LP, 2009 WL 484218 (N.D. Tex.-Fort Worth 2009), at *3.

Under long-established Texas law, it is inherent in any agency relationship that fiduciary duties are owed by an agent to his or her principal. Republic Bankers Life Insurance Co. v. Wood, 792 S.W.2d 768, 778 (Tex. App.-Fort Worth 1990, writ denied). One of the primary duties of an agent is the common-law duty of strict loyalty to follow and/or obey all reasonable and lawful instructions issued by the principal with regard to performing any service he or she has contracted to perform. This translates to a strict contractual (at law) and fiduciary (in equity) duty on the part of the agent to adhere faithfully to all clear instructions of the principal in all cases in which the instructions can be considered lawful. General Motors Acceptance Corp. v. Crenshaw, Dupree & Milam, LLP, 986 S.W.2d 632, 636 (Tex. App.-El Paso 1998, pet. denied)(Crenshaw)("Furthermore, an agent must obey the lawful directions of its principal."); Albright v. Lay, 474 S.W.2d 287, 291 (Tex. Civ. App.-Corpus Christi 1971, no writ)(Albright); RESTATEMENT (SECOND) OF AGENCY, §385 (1957); Also see: 3 TEX. JUR. 3d, "*AGENCY*," §157, at 206-207 (Thompson-West 2004).

A finding, under Texas law, that an agent has violated the lawful instructions of his principal fixes personal liability on the agent for all damages flowing out of that violation. Albright, 291 ("A fact finding that the agent violated the instructions of his principal fixes a personal liability on him."); Schwarz v. Straus-Frank Co., 382 S.W.2d 176, 178 (Tex. Civ. App.-San Antonio, 1964, writ refused n.r.e.)("This finding that defendant violated his principal's instructions fixed a personal liability upon him."); Taylor v. Jones, 244 S.W.2d 371, 372 (Tex. Civ. App.-Texarkana 1951, no writ)("If, as the facts show, Wolverton, in violation of his instructions from Jones, left the lumber on appellant's yard in San Antonio to be sold by Choate for Jones, he violated appellee's instructions and thereby became liable to appellee, together with Choate and Taylor, for the value of said lumber.")

A clear application of this principle is seen in the above-cited El Paso Court of Appeals case of Crenshaw. In that case, an established Lubbock law firm (Crenshaw) undertook to represent both the seller and the purchaser of an automobile dealership, in Lubbock, Texas, in 1989 and 1990. The purchasers (the Roses) showed the Crenshaw firm had represented them as attorneys for over 30 years, at the time it undertook to represent both the seller of the dealership and the Roses as purchasers. The seller of the automobile dealership, GMAC, showed it had been aware of the previous attorney-client relationship between Crenshaw and the Roses and had specifically instructed Crenshaw to obtain a written waiver of conflict-of-interest document, signed by the purchasers, as part of the instructions regarding the closing of the sale of the dealership. For unexplained reasons, Crenshaw failed to follow those instructions, resulting in subsequent litigation against GMAC by the purchasers, alleging, at least in part, conflicts-of-interest by reason of the dual representation, by Crenshaw, of both the buyer and the seller in the transaction.

The trial court granted summary judgment against GMAC. The El Paso Court of Appeals reversed, using the following language:

> It is undisputed that C D & M represented Appellant, thus an agent-principal relationship existed. The record before this Court demonstrates that Appellant instructed its attorneys at C D & M to obtain a waiver from the Roses. In doing so, Appellant anticipated the conflict waiver would be a valid and enforceable one, thus protecting it from any lawsuits resulting from the dual representation. By failing to obtain a valid waiver, CD & M failed to follow the lawful instructions of its principal and thereby exposed

> Appellant to liability. Appellant's Points of Error Nos. One and Two are sustained.

Crenshaw, *supra*, at 636.

In apparent harmony, the United States District Court in South Dakota recently stated, in Kent v. United of Omaha Live Insurance Co., 430 F. Supp. 2d 946, 955 (D.C. South Dakota, Southern Div. 2006), that "a principal and an agent are in a fiduciary relationship." Kent, *supra*, at 955.

Even more compelling, is statutory confirmation that an agent in South Dakota must obey the instructions of his principal except under the narrowest of circumstances. Although entirely omitted from the choice of law arguments in Defendant's Motion, Section 59-3-7 of South Dakota Codified Laws states:

> 59-3-7. Agent's power to disobey instructions. An agent has power to disobey instructions in dealing with the subject of the agency, in cases where it is clearly for the interest of his principal that he should do so, and there is not time to communicate with the principal.

Far from establishing a conflict of laws, Section 59-3-7 appears to state, by overt implication, that in the absence of the limited circumstances set forth in the Section (not alleged in this matter), an agent in South Dakota must strictly obey the clear and lawful instructions of his principal in dealing with the subject of the agency. This is not, of course, a surprise, given that obedience and loyalty has long been one of the bedrock cornerstone duties owed by an agent to his or her principal in virtually all English-speaking jurisdictions. See 3 AM. JUR. 2d, "*AGENCY*," §213-216 ("An agent has a duty to obey all reasonable instructions....”); RESTATEMENT (SECOND) OF AGENCY, §385 (1957); Also see: 3 TEX. JUR. 3d, "*AGENCY*," §157, at 206-207 (Thompson-West 2004).

Section 59-2-3 of South Dakota Codified Laws also states (with regard to the formation of an agency relationship) that an “oral authorization is sufficient for any purpose, except that an authority to enter into a contract, other than a negotiable instrument, required by law to be in writing can only be given by an instrument in writing.”

Citibank has not only failed to establish that the law in South Dakota differs from that of Texas on whether an agent has liability for failing to follow clear and lawful instructions from his principal, a rudimentary study of South Dakota statutory law establishes no conflict. For this basic reason, the party’s choice of South Dakota law in the Card Agreement has no significance to this case whatsoever.

(b). Defendant’s Motion erroneously argues that the *only* form of “contract” that could ever be shown between Plaintiffs and Citibank is the Card Agreement, and the Card Agreement provides no possibility for the type of agency status of Citibank made the basis of Plaintiffs claims. In fact, the terms of the Card Agreement contain exactly such a contemplated agency status for Citibank with regard to its promised assistance to the cardholder in solving “a problem with the quality of property or services” purchased with the card.

Defendant’s Motion contains, on page 10, paragraph 25, the following clearly erroneous **legal** conclusion upon which the entirety of its arguments rest:

> Here, the only true contract at issue is the Card Agreement governing the Account, which Mrs. Tran agreed to by using the Account. Mrs. Tran, however, cannot establish any claim for breach of the Card Agreement based on the undisputed facts presented.

This legal conclusion is simply and obviously erroneous.

The Card Agreement unambiguously contains, in the final paragraph, found on page 16, the following language (drafted unilaterally by Citibank):

> ***Special Rule for Credit Card Purchases.***
> If you have a problem with the quality of property or services that you purchased with a credit card, and you have tried in good faith to correct the problem with the merchant, you may have the right not to pay the remaining amount on the property or services. There are two limitations on this right:
>
> - You must have made the purchase in your home state or, if not within your home state, within 100 miles of your current address; and
> - The purchase price must have been more than $50.
>
> These limitations do not apply if we own or operate the merchant, or if we mailed you the advertisement for the property or services.

See Defendant's Motion, Appendix, Exhibit A, page 16.

Citibank's Motion entirely omits any reference to this part of the Card Agreement. Instead, it ignores salient and admissible evidence (referred to in Plaintiffs' pleadings, discovery responses, deposition testimony and summary judgment affidavits) that (1) Plaintiffs requested the assistance of Citibank regarding just such a "problem with the quality of property" purchased by Dr. Tran on the Citibank Card and provided written confirmation of the facts regarding the defective purchase, (2) Citibank agreed to assume the role of Plaintiff's agent, in the late summer of 2006, in issuing a timely and proper notice to the merchant of a "challenge" by the Plaintiffs of the entirety of the transaction made the subject of Plaintiffs claims, and (3) Citibank failed to follow the instructions of Plaintiffs with regard to challenging the entirety of the transaction.

Citibank requested and received written factual confirmations regarding the status of the ongoing dispute with the merchant and clear instructions from Plaintiffs with regard to the issuance of a timely and proper notice to the merchant of their challenges sufficient to allow them to avoid the full payment for the defective equipment. (See Affidavit of Dr. Tran, ¶¶ 11, 12 & 13). On September 7, 2006, these requested written factual confirmations (on forms promulgated and issued by Citibank for such purposes) were timely executed by Dr. Tran and delivered to Citibank, along with instructions that Citibank issue proper and timely notices to the merchant of the objections of Plaintiffs to the quality of the merchandise sufficient to challenge the *entire* "transaction" between Dr. Tran and the seller. (See Affidavit of Dr. Tran, ¶¶ 11, 12 & 13).

Only months later, and after the defective merchandise had been returned to the seller, were Plaintiffs able to learn that, in fact, Citibank had *not* followed their clear and lawful instructions, but had issued a timely notice of challenge only as to a *portion* of the transaction (i.e. leaving the $10,000 portion of the original transaction entirely without any timely notice of challenge from the Plaintiffs). (See Affidavit of Dr. Tran, ¶¶ 24 & 25). Only later, with the aid of formal discovery, were Plaintiffs able to learn when and how Citibank had issued an untimely notice of Plaintiff's challenge regarding the "other part" of the charge on the Card in the transaction at issue (which the merchant then rejected). (See

Affidavit of Dr. Tran, ¶¶ 24 & 25). Citibank made no voluntary disclosure of its mistake to Plaintiffs, unless one considers its unilateral act of reinstating the $10,000 charge on the Card Account sufficient disclosure in and of itself. (See Affidavit of Dr. Tran, ¶¶ 30, 31, 32 & 33).

Plaintiffs then, acting *pro se*, put Citibank on written notice of their claim, on January 15, 2007 and again on February 19, 2007. (See Affidavit of Dr. Tran, ¶¶ 34, 35, 36 & 37). Plaintiffs insisted that (1) the $10,000 debit which had been unilaterally added to the balance of the Account of Mrs. Tran on the Citibank Card be removed because it was an unauthorized charge, and (2) Citibank *not* report, to third-party credit agencies, that the false debit charge created by Citibank's own mistake was a simple nonpayment of the Account by Plaintiffs.

On August 6, 2007, Plaintiffs forwarded additional correspondence to Citibank, addressed to the vice-president of its credit services subsidiary (T. Wingfield), again requesting a removal of the disputed $10,000 charge on the Account and requesting that Citibank refrain from attempting, by publishing the clearly false credit references regarding Plaintiffs, to "deliberately destroy" the Plaintiffs previously excellent credit reputations. (See Affidavit of Dr. Tran, ¶¶ 37).

Citibank ignored all of these requests, and, in the face of virtually undisputed facts establishing a Citibank error in failing to issue the instructed proper and timely notice to the merchant of a challenge to the ***entire*** transaction, falsely reported the matter (as to both Plaintiffs) as a simple nonpayment of the

Account balance, significantly damaging the credit scores of both Plaintiffs. (See Affidavit of Dr. Tran, ¶¶ 39, 40, 41, 42, 43, 44, & 45).

These critical and controlling facts, and the allegations of liability arising from them, are entirely *missing* from Defendant's Motion.

Instead, Citibank relies on its legal conclusion that *only* a breach of the "other" written terms of the Card Agreement could ever be grounds to establish any form of breach of contract by Citibank. By such efforts, Citibank apparently hopes to unilaterally "*reshape*" the claim of Plaintiffs and defeat, in summary judgment, the *reconfigured* claim.

Rule 56 requires this Court hold Citibank to a different standard. That standard requires this Court to review the unchallenged pleadings of Plaintiffs in their *entirety* in passing on the Motion. That Citibank has chosen to *ignore* the breach of agency contract claims against Citibank in the live pleadings of the Plaintiffs cannot grant this Court license to depart from its obligation to examine the *entirety* of the pleadings at summary judgment. In other words, because Citibank has chosen to ignore, in its Motion, the true nature of the breach of contract allegations against it, it has doomed its Motion to failure. Under this record, the Motion is defective, as a matter of law, under Rule 56. United States v. Stribling Flying Serv., Inc., 734 F.2d 221, 224 (5th Cir. 1984); *WRIGHT, MILLER & KANE*, §2722, page 368, n. 3.

Plaintiffs' Second Amended Original Petition (Petition)(Attached to Citibank's Motion, as its Pleading Appendix), filed December 11, 2009, presents, logically and in chronological order, the history of the dispute between Plaintiffs and Citibank, beginning with the opening of Plaintiff Mrs. Tran's Citibank Gold MasterCard account prior to August 2006 (¶ 1). The pleading next explains that in August 2006, Dr. Tran, as an authorized user on the Account, purchased electronic equipment from a third-party merchant and placed the consideration for the purchase, in the approximate amount of $15,000, on the Citibank Gold MasterCard (¶ 3). The Petition next alleges Dr. Tran's discovery, upon delivery, of the defective condition and non-suitability of the equipment, his undisputed cancellation of the purchase, his return (albeit delayed) of the equipment, and his timely notification to Citibank of his decision to exercise his right to ***stop*** all payments to the merchant on, or by way of a charge against, the Card (¶¶ 4, 5 & 6).

The Petition next alleges that because the charges for the defective equipment were in two (2) separate transactions on Mrs. Tran's Card, Citibank instructed Plaintiffs to execute written instructions in the form of two (2) separate documents (both dated September 7, 2006), confirming Dr. Tran's written instructions for the timely issuance, by Citibank, of a notice to the merchant of the cancellation of the purchases by reason of the challenge being made of defective equipment, and the dates of the execution of those written instructions by Dr. Tran (¶¶ 7 and 8). The Petition then alleges that Citibank, in violation of the instructions issued by its customer, and in "breach of the contract," issued a notice of challenge with regard to only the *second* transaction (in the amount of $4,580) and "entirely neglected and/or failed to cancel and/or rescind the *first* transaction Plaintiffs had instructed" Citibank to issue notices of cancellation and rescission for (in the amount of $10,000)(¶ 9).

The Petition next alleges, in chronological order, the unilateral and steadfast refusal of Citibank to acknowledge its error (¶¶ 12, 13 & 14), and the sequent belligerent insistence of Citibank (both in its dealings with Plaintiffs and in its erroneous notifications to third-party credit agencies) that the ***unauthorized*** charge placed by Citibank on Mrs. Tran's Card, in the amount of $10,000 (***after*** it was wrongfully allowed to become, by reason of Citibank's error, fully funded to the merchant without Plaintiffs knowledge), was rightful and legitimate, when Citibank was fully aware the truth was entirely otherwise (¶¶ 11, 12, 13 & 14). The Petition alleges repeated notices to Citibank of its error and written requests that the error be corrected, followed by the wrongful issuance by Citibank of erroneous credit information, causing the false notation with those credit agencies that both Mrs. Tran and Dr. Tran had incurred a *legitimate* debt and obligation to Citibank and had simply refused to pay a legitimate debt, causing both Plaintiffs damage to their credit reputations (¶¶ 14 and 15).

These unchallenged allegations, on their face, assert state common-law breach of contract claims for Citibank's failing to follow instructions, and for the common law tort claim of libel. Citibank cannot properly be allowed to re-plead the case of Plaintiffs merely because it would *prefer* to defend a different claim than the one actually asserted.

The Motion is defective as a matter of law.

(c). The common-law libel case of Plaintiffs is not, under the evidence in *this* case, preempted by the FCRA.

The Motion falsely claims that the common law tort claims of Plaintiffs, alleging an intentional tort of libel against Citibank, are preempted by the Fair Credit Reporting Act (FCRA), 15 U.S.C. §1681, *et seq.*

In Carlson v. Trans Union, LLC, 259 F. Supp.2d 517, 522 (N.D. Tex. 2003), the revered late Senior District Judge, Barefoot Sanders, specifically held that "Section 1681t (b)(1)(F)[under the FCRA] does not preclude Plaintiff's state law claim for defamation." (Explanation added). In reaching the conclusion, be Court in Carlson stated:

> Section 1681h (e) applies to torts. The section specifically refers to "any action or proceeding in the nature of defamation, invasion of privacy, or negligence." All claims in the (non-exclusive) list are torts. Section 1681t (b)(1)(F) gives every indication of dealing only with state statutory regulation. This is made yet more clear when you consider [that two state statutory laws] are specifically excluded from §1681t (b)(1)(F)'s coverage.
>
> ****
>
> There is no indication that Section 1681t (b)(1)(F) was meant to completely preempt ALL state law claims including state common-law claims. Furthermore, by its own terms §1681t (b)(1)(F) only applies to state laws "with respect to any subject matter regulated under section 1681s-2." 15 U.S.C. §1681t (b)(1)(F). Were the state law claims brought by Plaintiff in this case claims under the Texas state consumer protection laws, the Court would obviously conclude that such claims were preempted because the subject matter of the two statutes would be the same. However, Plaintiff's remaining state law claim against Verizon in this case is not statutory, but rather is a common law claim for defamation.

Carlson, at 520-521.

This construction of no preemption by the FCRA of common-law defamation actions was expressly approved, citing Carlson's reasoning, in Sites v. Nationstar Mortgage, LLC, 646 F. Supp. 2d 699, 709 (D.C.-Pennsylvania 2009).

In the alternative, Plaintiffs submit that the evidence in this case *does* clearly raise a fact issue regarding whether Citibank, under the unique circumstances of this case, after being placed on written notice by the Plaintiffs of its undisputed failure to follow their instructions by issuing a notice of a challenge of the entire transaction, acted "**with malice**" when it falsely reported to third-party credit agencies that the $10,000 charge occasioned, Plaintiffs allege, by its failure to follow instructions, was instead an otherwise legitimate and simply unpaid obligation of Plaintiffs on the Account. Before Plaintiffs had even retained counsel, they were accusing Citibank, in written correspondence, dated August 6, 2007, of "**deliberately**" attempting to destroy their credit reputations. (See Affidavit of Dr. Tran, ¶ 37)(See Affidavit of Mrs. Tran, ¶ 17).

Citibank admits, on page 16, paragraph 40, of the Motion, that 15 U.S.C. §1681h (e) tolerates such a claim for defamation if proof of malice or willful intent to injure is shown.[1]

(d). The evidence raises a fact issue on the ridiculous assertion in the Motion that both of the Plaintiffs (who had credit scores of approximately 800 prior to the alleged libelous publication by Citibank) were "libel-proof," simply because there were other relatively minor negative entries on the credit reports of each.

[1] It should also be noted that the 2 decisions cited by Citibank (Ewbank v. Choicepoint, Inc., 551 F. Supp. 2d 563 (D.C.-Dallas 2008) & McDonald v. Equifax, Inc., et al, 2009 WL 2835753 (D.C.-Dallas 2009)) both involved summary judgments where the plaintiff either filed *no* response, or filed a response without *any* supporting evidence on the issue of malice or intent.

The summary judgment evidence submitted by Plaintiffs establishes that prior to the libelous publication by Citibank falsely asserting that the $10,000 debit on Mrs. Tran's Citibank Card Account, caused by its own misconduct, was actually a legitimate but simply unpaid obligation, each had credit scores of approximately 800 with each of the 3 major credit reporting agencies. (See Affidavit of Dr. Tran,¶¶40, 41, 42, 43, 44, & 45) (See Affidavit of Mrs. Tran,¶¶20, 21, 22, 23, 24, & 25). The Plaintiffs each achieved these exemplary credit scores despite the fact that an earlier minor dispute with a service provider regarding repairs at their homestead had resulted in at least one other unfavorable mark on their credit reputations. (See Affidavit of Dr. Tran, ¶ 40)(See Affidavit of Mrs. Tran,¶20).

Seizing on the evidence of the public reporting of this earlier minor dispute (involving less than one hundred dollars) as to each of the Plaintiffs, Citibank immediately jumps to the ridiculous conclusion that "Plaintiffs have no credit reputation to lose" (see Defendant's Motion, page 21, paragraph 51), and thereby asserts that it has established, as a matter of law, that each of the Plaintiffs are "libel-proof" with regard to their credit reputations.

The doctrine of the libel-proof plaintiff is said to be the logical outgrowth of the rule that a plaintiff's tarnished reputation may be shown in mitigation of damages, as where the plaintiff's reputation is so bad that it cannot be further damaged, there is no actionable defamation. Finklea v. Jacksonville Daily

Progress, 742 S.W.2d 512 (Tex. App.-Tyler 1987, writ dismissed w.o.j.). The doctrine is limited, however, to those situations where the evidence establishes that the nature of the prior conduct of the plaintiff, the number of offenses, and the degree and range of public notoriety from those actions make it clear, as a matter of law, that the plaintiff's reputation could not have suffered from publication of the false and libelous statement. McBride v. New Braunfels Herald-Zeitung, 894 S.W.2d 6 (Tex. App.-Austin 1994, writ denied).

In this action, the above-cited portions of the summary judgment evidence establishes that despite the earlier minor adverse credit notations on each of the Plaintiffs credit files prior to its present dispute being reported falsely by Citibank, each had a credit score of approximately 800 with the 3 major credit reporting agencies. Plaintiffs would request this Court take judicial notice of the fact that a person with a credit score anywhere near 800 could not be considered, as a matter of law, a person of such diminished credit reputation as to be beyond possible further damage by the issuance of a false $10,000 negative credit report such as the one issued by Citibank. Any assertion to the contrary is simply ridiculous and should be rejected as frivolous.

At the very least, a fact issue is raised as to this affirmative defense.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of July 2010, I electronically filed the foregoing with the Clerk of this Court using the ECF system which will send notification of such filing to the following Counsel for the parties in this cause:

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